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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1180

ADAMS POTATO CHIPS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. OR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND REQUEST FOR VACATION OF JUDGMENT AND REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR FURTHER CONSIDERATION AND APPENDIX

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Petitioner, ADAMS POTATO CHIPS, INC., petitions for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered in this case on the 17th day of August, 1970.

OPINIONS BELOW

The Decision of the Trial Examiner appears at page two of the Appendix. The Board's Decision and Order, adopting the findings, conclusions, and recommendations of the Trial Examiner, appears at page forty-six of the Appendix. The opinion by the United States Court of Appeals for the Sixth Circuit upholding the ruling of the National Labor Relations Board was filed August 17, 1970 and is appended hereto.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered August 17, 1970, is invoked under the provisions of 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

The question presented is whether under the National Labor Relations Act the National Labor Relations Board and the United States Court of Appeals can order a party to agree to a substantive provision of a collective bargaining agreement.

STATUTE INVOLVED

The relevant provision is Section 8(d) of the National Labor Relations Act as amended (29 U.S.C., Section 151, et seq.) is appended hereto.

STATEMENT OF THE CASE

The National Labor Relations Board found the Petitioner to be in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act as amended, "by refusing to execute, sign and give effect to the contract agreed

by the parties on August 27, 1958, and by refusing, on that date to recognize Local 580 as the exclusive bargaining agent of its employees in a unit appropriate for the purposes of collective bargaining." The Board ordered the petitioner to cease and desist from its refusal to execute such a contract and to recognize Teamster Local 580 and to take the affirmative action required to remedy such refusal. (A. 58a, 59a)

The United States Court of Appeals for the Sixth Circuit ordered enforcement of the Board's cross-petition affirming the Board's order stating that the company was in violation of Sections 8(a)(5) and (1) of the Act by refusing to execute a contract containing Teamster substantive proposals (not submitted to the Company's president pursuant to the Ratification Agreement of the parties), and by refusing to recognize and bargain with Teamsters' Local 580. The Petitioner respectfully contends that the findings and orders of the Board and the Court below are contrary to the letter and spirit of the National Labor Relations Act, 29 U.S.C., Sec. 151, et seq.

The facts in this case concerning events which occurred between September 30, 1957 and August 27, 1958 have not been disputed.

1. Teamsters Local 580 was certified as the collective bargaining agent for the eight (8) driver-salesmen employed by Appellant at Lansing, Michigan on September 30, 1957.

2. At the request of the union the parties met in Lansing in early November, 1957 for the purpose of commencing collective bargaining. Lloyd McKim, Secretary-Treasurer of Teamsters Local 580, stated that his authority was limited to negotiating tentative agreements subject to ratification by the driver-salesmen in the bargaining unit.

In like manner Donald Strutz, attorney for the company stated that no terms and conditions tentatively agreed to could be binding upon the Company unless and until they had been approved by Charles H. Seyfert, President, Adams Potato Chips Company. The Trial Examiner found this Ratification Agreement (A. 48a) and the Board adopted his finding. (A. 46a)

3. After a series of contract negotiations lasting several months, the parties reached tentative agreement at the bargaining table and Strutz and Eugene Cawvey, the Company's Sales-Manager, returned to Fort Wayne, Indiana. There the tentative agreements were typed into contract form, submitted to Mr. Seyfert, approved by him and mailed to Teamster's Local 580 to be ratified by the driver salesmen.

4. McKim presented the Seyfert approved contract proposals to all eight (8) driver-salesmen at a meeting called for the express purpose of obtaining ratification. The contract proposals were unanimously rejected by the bargaining unit employees who thereupon voted 5-3 in favor of a strike.

5. A series of negotiations followed under the auspices of the Federal Mediation and Conciliation Service with no change in the original tentative agreements resulting therefrom. Finally, McKim suggested that the Company hold a meeting of all eight driver-salesmen for the purpose of explaining the original tentative agreements, just prior to the second ratification meeting of the bargaining unit employees which had been scheduled by the Teamsters.

6. A dinner meeting of the driver-salesmen was held by the Employer in July 1968 at which route cuts, inventory controls and the other Seyfert approved contract pro-

posals were discussed. Immediately thereafter all of the bargaining unit employees met in the Teamsters' office and by a vote of 8-0 rejected the prior tentative agreements for the second time.

7. Additional meetings followed in the presence of the Federal Mediator and again no changes in the original tentative agreements resulted from such meetings. Finally on or about August 20, 1968 the Teamsters requested a meeting to be held in Lansing on August 27, 1968, approximately three weeks before the end of the certification year. There were no indications that the Company or the Teamsters were willing to make a significant move from their respective positions (held for approximately 5 months) but the Company agreed to meet with McKim on August 27 in Lansing.

All but one fact concerning events which occurred at the meeting requested by the Teamsters on August 27, 1968 are not disputed. The meeting was attended by Strutz and Cawvey for the Company, and by McKim and six of the eight driver-salesmen.

1. McKim opened the meeting by handing Strutz written contract proposals identical to those tentative agreements twice unanimously rejected by the eight bargaining unit employees, and inquired if President Seyfert were still willing to approve them. Strutz replied affirmatively.

2. McKim then made three contract demands; a change in the proposed overage and shortage provision, a change in the proposed term of the contract, and a change in the proposed vacation provision. Strutz refused to take the first and second demand to Seyfert for approval.

3. McKim asked Strutz and Cawvey to leave the room and by a vote of 4 to 2 obtained approval of the original tentative agreements as amended by McKim's proposed change in the vacation provision. He then called them back into the room and announced that the parties had a contract.

4. It is undisputed that the Teamster's demand for a change in the proposed vacation provision (3 weeks after ten years) was not submitted to President Seyfert for approval. (A. 107)

5. There is no evidence that Seyfert was ever aware of the Teamsters' proposed vacation change or that he ever had the opportunity to approve or disapprove such demand.

The one disputed fact (of events which occurred at the meeting of August 27) concerns Strutz's response to McKim's demand for a change in the vacation provision and his announcement of a contract.

1. Strutz, Cawvey and two driver salesmen testified that Strutz at first replied that he would take the vacation demand back to President Seyfert in Fort Wayne, Indiana with a recommendation for its approval; however, when he learned that McKim had obtained a 4-2 vote in favor of the Teamsters' amended contract proposals, he then refused to take the vacation demand to Seyfert. (A. 100; A. 106-107; A. 116)

2. McKim testified that Strutz replied that the vacation demand conformed to company policy, and was therefore acceptable without obtaining Seyfert's approval; however, upon learning of the 4-2 vote, Strutz refused to sign the contract with the amended vacation demand. (A. 67; A. 70)

3. The only other union witness, driver-salesman Bretz, testified that Cawvey (not Strutz) replied that the vacation demand presented no problem, and McKim could change it; on cross-examination Bretz admitted that Strutz, upon learning of the 4-2 vote, refused to take the vacation demand to President Seyfert to be approved pursuant to the Ratification Agreement. (A. 85; A. 87)

REASONS FOR GRANTING THE WRIT

The Trial Examiner's finding of a Ratification Agreement requiring President Seyfert's approval (A. 48) was adopted by the Board (A. 46), and the majority in the Court below has noted both the validity of such an Agreement and the binding nature thereof.

> "Based on uncontradicted testimony I find that the parties agreed that any contract reached by the negotiators, Donald F. Strutz and Eugene Cawvey for Respondent and Lloyd C. McKim for Local 580, would be subject to ratification by Charles Seyfert, Respondent's president, and by vote of the employees in the bargaining unit." (Footnote omitted) (App. at 48)

Section 8(d) of the National Labor Relations Act provides:

> "For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times in conferring good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but *such obligation does not compel either party to agree to a proposal or require the making of a concession. . .*". (Emphasis supplied)

H. K. Porter Co. v. National Labor Relations Board, 397 U.S. 99, 90 S.Ct. 821 (1970) is controlling wherein this

Court held that the Circuit Court could not grant enforcement of a Board order requiring the Company to execute a contract which contained a provision to which it had not agreed apparently for the sole purpose of frustrating the union. This Court reasoned that the provision involved a mandatory subject of bargaining, and, regardless of the company's conduct, it could not be required to agree to the provision. This is the basis for Circuit Judge Weick's persuasive dissent in the Court below wherein he says, "The law, however, is clear that the Board has no authority to order an employer to execute a contract which contains terms to which he has not assented. Section 8(d) of the Act specifically so provides. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)."

In his dissent Judge Weick points out that the company negotiator (Strutz's) express agency was limited, that this limited agency was made known to the union and accepted as a part of the Ratification Agreement of the parties, and that Strutz had no authority to bind President Seyfert to a contract. "He could not enlarge on the scope of his agency by his own declarations and acts, and the union, which had actual knowledge of the limitations on Strutz's authority, could hardly rely on any such declarations. Agency cannot be established by the acts and declarations of the alleged agent. *Atchison, Topeka & Santa Fe Ry Co. v. Bouziden*, 307 F.2d 230 (10th Cir. 1962). Particularly is this true where the authority of the agent has been clearly delineated by agreement of the parties."

The Trial Examiner, the Board, and the majority below ignored the testimony of five of the six witnesses, all of whom controverted McKim, the Teamster negotiator's sole testimony that Strutz said he could agree to the vacation demand without President Seyfert's ap-

proval' In so doing the Board characterizes the Teamster vacation demand as minor in an attempt to expand the Company negotiator's limited express authority to permit him to accept this Teamster demand without submitting it to President Seyfert, as he had done with every prior tentative agreement reached at the bargaining table.

The dissenting opinion below exposes the error committed by circumventing the restrictions of Section 8(d) under the guise of a "*minor change*":

> "This is not a case of a minor change in an agreement. It involved a mandatory subject of bargaining. Under H. K. Porter, it is clear that the Board could not compel the company president to agree to the vacation change in spite of the fact that there was no company policy against it, and the fact that it would cause the company no great inconvenience.
>
> "Since it cannot compel the principal directly, it cannot do so indirectly by gratuitously expanding the agent's authority contrary to the agreement of the parties.
>
> "The remarks of the Court in H. K. Porter are particularly apt:
>
> > 'It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process. 397 U.S. at 109.' "

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1. All witnesses, including McKim, concurred that on the overage and shortage proposal and on the contract term proposal, made just prior to the vacation proposal, Strutz re-affirmed the limitation of his authority, by refusing to take them to Seyfert for approval.

In his dissent Judge Weick clearly demonstrates that President Seyfert was under no obligation to testify in the Board hearing to repudiate any alleged unauthorized statement of Strutz since there was not "a scintilla of evidence that the Company President ever saw the proposal, let alone ratified it".[2]

The dissenting opinion succinctly states the law of the case under Section 8(a) as enunciated in H. K. Porter:

> "The burden of proof was upon General Counsel for the Board to establish by a preponderance of the evidence that the president ratified the proposed agreement negotiated by the company's negotiator. He offered no proof tending to show such approval."

The Board admitted, in adopting the Trial Examiner's erroneous decision (that final agreement had been reached without the prescribed ratification), that it acted *not upon the testimony* but upon "*extrinsic facts*, as distinguished from the testimony". (A. 6)

Supportive evidence, *not extrinsic facts*, discernable only to Trial Examiner Funke, is required to establish that President Seyfert ratified the Teamsters' proposed agreement containing the three week vacation demand. The failure of the Board to give intelligible reasons to support its findings and conclusions that "complete and final agreement was reached between the parties on August 27. This finding is based upon the following extrinsic facts as distinguished from the testimony:" is clear reversible error. *Secretary of Agriculture* v. *United States*, 347 U.S. 645.

There was no charge and no finding, that Strutz's refusal to take the Teamster's first two demands (overage and shortage provision and duration of proposed contract)

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2. Company negotiator Eugene Cawvey's uncontradicted testimony is that the Teamsters' vacation demand was not submitted to Mr. Seyfert for approval. (A. 107)

to President Seyfert on August 27 constituted bad faith bargaining. However the Board, and the Court below, found that Strutz's refusal to submit the Teamsters' 3-week vacation demand to Seyfert "*supported a charge of bad faith bargaining.*" But in holding that the Board has the right to compel this employer, found to be bargaining in bad faith, to sign a contract not ratified by President Seyfert, the lower court violates the rule which it has clearly enunciated:

> "The National Labor Relations Act is remedial rather than punitive and contemplates protection of public rights which it creates and defines. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940); *Consumers Power Co.* v. *NLRB*, 113 F.2d 39 (C.A. 6, 1940)."

The general rule often repeated is that the Board has broad remedial powers in order to effectuate the purposes of the Act. But it is not the purpose of the Act to force an agreement upon President Seyfert as a punishment for Strutz's refusal to submit the Teamsters' vacation demand to him for approval.

> "The Act does not compel agreement between employers and employees. It does not compel any agreement whatever . . . the theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustment and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

In *NLRB* v. *American National Insurance Company*, 343 U.S. 395, 96 L.Ed. 1027, 72 S.Ct. 24 (1952), this Court held,

> "In 1947, the fear was expressed in Congress that the Board 'has gone very far, in the guise of determining

whether or not employers have bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may make or may not make.' Accordingly, the Hartley Bill, passed the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submissions of counter proposals.

"As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act. That section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession." (*American National Insurance Company*, page 404).

In *Majure* v. *NLRB*, 197 F.2d 735 (5 Cir. 1952), the Court cited with approval the Supreme Court's decision in American National Insurance Company, supra, and stated,

"That the obligation of the employer to bargain in good faith does not require the yielding of a position fairly maintained, nor permit the Board, under a guise of finding of bad faith, to require the employer to contract in a way which the Board might deem proper." (*Majure*, page 739).

The warning expressed by Chief Justice Burger, in his dissenting opinion in the *United Steelworkers* v. *NLRB*, 390 F.2d 846, cert. den. 391, U.S. 904 (1968) that

"The Board and unions generally may well come to regret the day when component parts of bargaining issues are considered in isolation." (*United Steelworkers*, page 858)

is dramatically demonstrated in the instant case wherein the Board and the Court below characterize the Teamster demand for a three week vacation as a *"minor change"*

which President Seyfert ought to agree to even though the company negotiator never submitted it to him for approval.

Thus Chief Justice Burger's prophesy was fulfilled when the Court below ordered enforcement of the Board's mandate that President Seyfert sign a Teamster Contract, to which he had no opportunity to agree, simply because "Strutz's refusal to take the Teamster vacation demand to Seyfert for approval *supported a charge of bad faith bargaining.*"

> "The majority opinion encourages a new bargaining device that can only serve to infringe on the whole collective bargaining process. The parties may now reach an overall contract incorporating those provisions they agree on and excluding those that they do not after the usual 'horse trading' process of bargaining, then one party can come to the Board and claim that the refusal to agree to some provision which was not included was an unfair labor practice because the recalcitrant party lacked a sufficient business or union reason." (*United Steelworkers*, page 858).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted, or in the alternative, that its Petition for a Writ of Certiorari be granted and the judgment of the Court below vacated and the case remanded for further consideration in light of *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, pursuant to this Court's order. *Tex Tan Welhausen Co. v. NLRB*, ... U.S. ....., 25 L.Ed.2d 805, 90 S.Ct. ..... (1970).

Respectfully submitted,

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Fort Wayne, Indiana 46802
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CERTIFICATE OF SERVICE

Three (3) copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit or Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Request for Vacation of Judgment and Remand to the United States Court of Appeals for the Sixth Circuit for Further Consideration and Appendix have been sent by United States Mail to the office of General Counsel, National Labor Relations Board, Washington, D. C. 20570, on this 28th day of December, 1970.

DONALD F. STRUTZ
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STATUTES

Labor-Management Relations Act of 1947, as amended (29 U.S.C.A. §151 et seq.):

(29 U.S.C.A. §158(a)(1) and (5)); Section 8(a)(1) and (5):

(a) it shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

(29 U.S.C.A. §158(d)); Section 8(d):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

No. 19769

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ADAMS POTATO CHIPS, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

ON PETITION to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Decided and Filed August 17, 1970.

Before: WEICK and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

CELEBREZZE, Circuit Judge. This cause is before the Court on the petition of Adams Potato Chips, Inc. ["the Company"] to review, and upon the cross-application of the National Labor Relations Board to enforce a Labor Board order requiring the Company to cease and desist from refusing to sign a contract, all substantive terms of which allegedly having been agreed upon, and to cease and desist from refusing to recognize and bargain in good faith with Teamsters and Chauffeurs, Local Union No. 580 ["the Union"]. Relying entirely upon the findings and conclusions of its Trial Examiner, the Board found that by refusing to sign said contract, the Company was in violation of Section 8(a)(5) and (1) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. § 158(a)(1) & (5) (1964). The Board's Decision and Order are reported at 176 NLRB No. 16 (1969). This Court's jurisdiction has

properly been invoked under Sections 10(e) and (f) of the Act.

The Labor-Management Relations Act enjoins employers to bargain collectively and in good faith with the bargaining agents of their employees about "wages, hours, and other terms and conditions of employment." It is well established, and not in dispute here, that vacation benefits for employees within the bargaining unit are "wages" within the meaning of the statute, and are, therefore, mandatory subjects of bargaining. *Young Manufacturing Company*, 143 NLRB 189 (1963); *Singer Manufacturing Company*, 24 NLRB 444 (1940). Once a company and a union have reached agreement upon all mandatory subjects of bargaining raised by either party, upon request of either, the other must sign it. *See, e.g., H. J. Heinz Company* v. *NLRB*, 311 U.S. 514, 525-26 (1941). The Board may not compel an employer, however, to sign a contract to which he has not agreed, for such compulsion would be tantamount to the imposition of unacceptable terms upon him. Just as the Act does not compel agreement, it does not authorize the Board to impose its views of a desirable settlement in such a manner. *H. K. Porter Company, Inc.* v. *NLRB*, 38 U.S.L.W. 4177 (U.S. March 2, 1970).

In the instant case, the union ratified and accepted a contract which included a particular vacation benefit clause. The Company had accepted all terms of the contract with the possible exception of the vacation benefit clause. The sole issue on this appeal is whether there is substantial evidence on the record as a whole to support the Board's finding that the Company had agreed to the vacation clause proffered by the Union. If there is, the Company violated Section 8(a)(1) and (5) of the Act by

refusing to sign the agreement. If there is not, the Board erred in compelling the Company to sign.[1]

The findings, conclusions, and recommended order of the Board's Trial Examiner were subsequently adopted by the Board *in toto*. The Trial Examiner found that the Union was certified on September 20, 1967 as the exclusive bargaining representative for "[a]ll driver-salesmen employed by the Employer at its Lansing, Michigan, place of business," and that the unit so described was appropriate. Based on undisputed evidence, he found that the parties, prior to the commencement of substantive negotiations, entered into a ratification agreement whereunder they agreed that any contract reached by the negotiators would be subject to ratification by the Company's president, and by vote of the employees in the bargaining unit. The ratification agreement was, apparently, not reduced to writing.[2] The parties then proceeded in substantive negotiations. The Union was represented in these negotiations by Lloyd C. McKim. The Company's negotiators were Donald F. Strutz and Eugene Cawvey.

At the final meeting between the parties, held on August 27, 1968, McKim introduced an offer previously

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1. We reject the Company's implications that the Union's ratification of the contract was in some way defective. First, because the Company has no standing to challenge the validity of a union's ratification election. *See Houchens Market of Elizabethtown, Inc.* v. *NLRB*, 375 F.2d 208 (6th Cir. 1967); *National Labor Relations Board* v. *Big Run Coal & Clay Co.*, 385 F.2d 788 (6th Cir. 1967). Second, because the ratification was in no way defective. Six of the eight-man unit voted in the election. All members were invited to the election. Four members present voted to ratify the contract. The absent members may be presumed to have been willing to accept the majority's wishes. *See, e.g., National Labor Relations Board* v. *Deutsch Co.*, 265 F.2d 473, 478-79 (9th Cir. 1959), *cert. denied*, 361 U.S. 963.

2. Neither party suggests that such a ratification agreement is of itself illegal, or that it is not binding upon both parties. See *National Labor Relations Board* v. *Darlington Veneer Company*, 236 F.2d 85 (4th Cir. 1956); *Allis-Chalmers Mfg. Co.* v. *NLRB*, 213 F.2d 374 (7th Cir. 1954).

made by Strutz and Cawvey, but twice rejected by a majority of men in the unit. McKim indicated that a majority of the men in the unit would be willing to ratify the proposed contract if a change were made in the vacation benefit clause which provided that men with 15-years' service would be entitled to a three-week vacation yearly. McKim offered to introduce the contract for ratification before the six unit members present at the meeting if Strutz and Cawvey could agree to change this term so as to give a three-week vacation to men with 10 years' service. McKim testified that Strutz told him he was authorized to accept this change without ratification of the Company president. According to McKim:

> "I said what about the three weeks vacation after ten years, and Mr. Strutz said well, we wondered why you didn't ask it because it is our company policy and I said the reason we didn't ask it, we didn't know it was company policy and so I said would you give us that concession and he said yes, I think we can give you that without any question, because it is company policy and all of the rest of the employees get it, and I said will you have to check that with Mr. Seyfert [the Company president] and he said no this is company policy and we can go along with that."

McKim's testimony is supported by that of one other witness.

Both Cawvey and Strutz testified that neither had authority to modify the proposed vacation package without the approval of the Company president, and, further, that Company policy had not been to give employees three-weeks' vacations after 10 years.

In any event, from substantially undisputed testimony, the Trial Examiner found that Cawvey and Strutz were then asked to leave the room in which the negotiations

were being conducted in order that the unit members present have an opportunity to vote on the proposed contract. McKim then took a poll of the six unit members present, four of whom voted to accept the contract subject to the 10-year-three-week vacation proposal. Strutz and Cawvey were then recalled to the meeting room and informed by McKim that: "You have got a contract." Strutz did not see it that way. He indicated, according to his own testimony, that in view of the fact that the unit was in the midst of decertification proceedings, which were instituted in July, 1968, and that in view of the fact that only four of the eight unit members had voted in favor of the contract, he would not submit it to the Company president for approval. As a result, the Union filed the instant charges.

The Trial Examiner credited the testimony of McKim that Strutz had indicated that the president's ratification was not required for the vacation benefit change, and that it was acceptable to Strutz, and therefore found that Strutz' subsequent refusal to submit the contract to the president for his signature was violative of section 8(a)(5). This finding, if supported by substantial evidence on the record as a whole, is binding on this Court.

As preliminary matters, neither of Strutz' stated reasons for not conveying the proposal to the Company president was proper. The Company cannot defend its refusal to sign on its own allegations of irregularities in the Union's ratification. N. 1, *supra* at p. 3. Nor is an employer relieved of his obligation to bargain during the certification year, absent unusual circumstances which are not present here. *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954). The Company's sole defense to the instant charge, therefore, can only be that no agreement was reached between the negotiators, and Strutz, therefore, was under no obliga-

tion, under the terms of the ratification agreement, to submit the contract to the Company president.

The Trial Examiner credited McKim's testimony that agreement had been reached with Strutz over Strutz' opposed testimony that it had not. His finding was supported by the following reasons:

> I do find, however, that complete and final agreement was reached between the parties on August 27. This finding is based upon the following extrinsic facts as distinguished from the testimony:
>
> 1. The change in the vacation clause requested by McKim was a minor one and conformed to the current policy of the Respondent with respect to inside employees. I see no reason why such a change would have to be referred to Seyfert and I accept McKim's testimony that Strutz said the change imposed no difficulty.
>
> 2. Strutz never stated that the vacation clause was the reason for rejecting the agreement. Strutz stated that Respondent doubted Local 580's continuing majority status and was therefore rejecting the contract.
>
> 3. The conduct of McKim at the meeting of August 27 indicated that he would accept the contract proposed by the Respondent if he could have it ratified by the membership. All changes which were proposed by McKim and refused by Respondent were discarded by McKim and it is evident that he was willing to accept the agreement proposed by Respondent.
>
> I therefore find that by refusing to sign the contract agreed upon by the parties, including the change in the vacation clause from 15 to 10 years of service for eligibility for a 3-week vacation, Respondent violated Section 8(a)(5) of the Act.

Were we the original finders of fact, our resolution of the diametrically opposed testimony in this case may well have been influenced by factors other than those enumerated by the Trial Examiner and adopted by the Board. We are charged by statute and case law, however, to uphold factual findings of the Board which are supported by substantial evidence on the record viewed as a whole. *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951). The credibility of witnesses is within the "special province" of the Board, which not only has experience and expertise in labor disputes, but also has the benefit of the Trial Examiner's observations as to demeanor evidence. See, *e.g.*, *Keener Rubber, Inc. v. NLRB*, 326 F.2d 968 (6th Cir. 1964), *cert. denied*, 377 U.S. 934.

The Trial Examiner's observations are supported not only by his perceptions of demeanor, but also by his evaluation, made on the basis of his expertise, that McKim's testimony was more likely true, under the circumstances of this case, than not. This finding is supported by testimony that appears in the record. We cannot say that it is insubstantial when viewed on the record as a whole.

For these reasons, the order of the Board is enforced.

McALLISTER, Senior Circuit Judge, concurring. It is my view that even though it be considered that Strutz, as the Company's agent, was not authorized to state that the matter of vacation pay, as proposed by the Union, was "company policy" and was acceptable to the Company, it was the duty of the Company's President, Charles Seyfert, for whom Strutz was acting, to repudiate any unauthorized statement of Strutz which did not meet with his approval, and that his failure to do so, either subsequent to the negotiations or as soon thereafter as he had heard of it, or at any time during the protracted proceed-

ings and hearing, where he did not even appear as a witness, resulted in a ratification of the statement of Strutz that the matter of vacation pay proposed by the Union was acceptable to the Company.

WEICK, Circuit Judge, concurring in part and dissenting in part. In my opinion there is substantial evidence of violations of §§8(a)(5) and (1) of the Act by refusal to bargain in good faith.

Strutz's insistence on a certain method of ratification of the agreement by the union members is a clear violation of the Act. It is equally clear that the company could not refuse to bargain on the ground of any doubt as to the majority status of the union within one year of certification. In my judgment, the refusal of Strutz to submit a contract proposal to the president of the company supported a charge of bad faith bargaining.

The law, however, is clear that the Board has no authority to order an employer to execute a contract which contains terms to which he has not assented. Section 8(d) of the Act specifically so provides. *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).

I depart from the majority opinion in its holding that substantial evidence on the record as a whole supports the Board's finding that agreement was reached on the vacation term and, therefore, the Board is entitled to enforcement of its full order, including that part which requires the company to execute the contract.

The trial examiner found:

> "Based on uncontradicted testimony I find that the parties agreed that any contract reached by the negotiators, Donald F. Strutz and Eugene Cawvey for Respondent and Lloyd C. McKim for Local 580, would be subject to ratification by Charles Seyfert, Re-

spondent's president, and by vote of the employees in the bargaining unit." (Footnote omitted) (App. at 48)

This finding was adopted by the Board (App. at 46), and the majority has noted both the validity of such an agreement and the binding nature thereof. See footnote 2, *supra*. Starting from this premise of the scope of the agents' authority to bargain for the company in this case, I am unable to find a scintilla of evidence to support the finding that the company president ratified the agreement which included the vacation proposal.

Granting that the trial examiner found that Strutz represented to the union negotiators that it would not be necessary to get the president's approval of the proposed change, it does not follow that an agreement was reached. Strutz's agency was limited, and he had no authority to bind his principal to a contractor. He could not enlarge on the scope of his agency by his own declarations and acts, and the union, which had actual knowledge of the limitations on Strutz's authority, could hardly rely on any such declarations. Agency cannot be established by the acts and declarations of the alleged agent. *Atchison, Topeka & Santa Fe Ry Co.* v. *Bouziden*, 307 F.2d 230 (10th Cir. 1962). Particularly is this true where the authority of the agent has been clearly delineated by agreement of the parties.

Assuming that the vacation proposal is company policy for inside employees, there having been presented no other evidence to show ratification by the president, the policy with respect to inside employees is not sufficiently probative to be "substantial" evidence where the inside employees are members of a different bargaining unit.

There is not an iota of evidence that the company president ever saw the proposal, let alone ratified it. While

this may be an element of bad faith bargaining, it nevertheless will not support the conclusion that there has been agreement. See *San Antonio Machine & Supply Corp. v. NLRB*, 363 F.2d 633, 636 (5th Cir. 1966).

In our opinion, *H. K. Porter*, *supra*, is controlling. In *H. K. Porter* the Supreme Court held that the Circuit Court could not grant enforcement of a Board order requiring the company to execute a contract which contained a provision to which it had not agreed apparently for the sole purpose of frustrating the union. The Court reasoned that the provision involved a mandatory subject of bargaining, and, regardless of the company's conduct, it could not be required to agree to the provision.

It appears that in the present case the Board has attempted to circumvent the restrictions of section 8(d). There is not a shred of evidence that the company president agreed to the proposal. By characterizing a vacation change as minor, the Board attempted to expand the authority of the company's bargaining agent to include approval of this change. This is not a case of a minor change in an agreement. It involved a mandatory subject of bargaining. Under *H. K. Porter*, it is clear that the Board could not compel the company president to agree to the vacation change in spite of the fact that there was no company policy against it, and the fact that it would cause the company no great inconvenience.

Since it cannot compel the principal directly, it cannot do so indirectly by gratuitously expanding the agent's authority contrary to the agreement of the parties.

The remarks of the Court in *H. K. Porter* are particularly apt:

> "It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are

insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process." 397 U.S. at 109.

The burden of proof was upon General Counsel for the Board to establish by a preponderance of the evidence that the president ratified the proposed agreement negotiated by the company's negotiator. He offered no proof tending to show such approval.

The fact that the president of the company was not called as a witness to testify did not operate to overcome the deficiency in the Board's evidence. In my judgment, there was no duty on the part of a litigant to offer proof where his adversary has failed to make out a case.

The appropriate remedy in this case is only to order the company to bargain in good faith with the union.

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge filed August 30, 1968, by Teamsters and Chauffeurs, Local Union No. 580, herein Local 580, against Adams Potato Chips, Inc., herein Adams or the Respondent, the General Counsel issued complaint dated October 26, 1968, alleging Respondent violated Section 8(a)(1) and (5) of the Act.

The amended answer of the Respondent denied the commission of any unfair labor practices and denied that Local 580 represented a majority of the employees in the appropriate bargaining unit.

This proceeding, with the Respondent and the General Counsel represented, was heard before me at Lansing, Michigan, on January 23, 1969. A brief was received from the Respondent on February 19, 1969.

Upon the entire record in this case and from my observation of the witnesses while testifying, I make the following:

Findings and Conclusions

I. The Motion for Judgment on the Pleadings

On December 4, 1968, Trial Examiner Charles W. Schneider issued an order granting Respondent's request for leave to file an amended answer and vacated in part his previous order granting the General Counsel's motion for judgment on the pleadings. Summary judgment was granted by the Trial Examiner as to paragraphs 2 to 10, inclusive, of the complaint and denying summary judgment as to paragraphs 1[1] and 11 through 16 of the complaint.

II. The Unfair Labor Practices

A. *The Evidence*

Following a petition filed in Case No. 7-RC-8230 and an election conducted by the National Labor Relations Board Local 580 was certified on September 20, 1967, as the exclusive bargaining representative of Respondent's employees in a unit described as:

> All driver-salesmen employed by the Employer at its Lansing, Michigan, place of business, excluding production employees, office and plant clerical employees, professional and technical employees, guards and supervisors as defined by the Act.

I find the unit so described appropriate.

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1. Paragraph 1 alleges that the charge was filed August 30, 1968 and served on Respondent on August 31, 1968, I so find.

Following the certification of Local 580 bargaining negotiations were held. Based on uncontradicted testimony I find that the parties agreed that any contract reached by the negotiators, Donald F. Strutz and Eugene Cawvey for Respondent and Lloyd C. McKim for Local 580,[2] would be subject to ratification by Charles Seyfert, Respondent's president, and by vote of the employees in the bargaining unit.

McKim testified that starting in November, 1967, some 15 bargaining meetings were held, concluding with a meeting on August 27, 1968. At this meeting McKim submitted to Strutz a proposed contract which had twice been unanimously rejected by the driver-salesmen.[3] Both Strutz and McKim agreed that this proposal was identical with the one which they had agreed upon but which the drivers had rejected. McKim discussed it with the drivers who still wanted changes related to overages and storages which were again rejected by Strutz. McKim requested that the contract term be reduced from 3 years to 2 years and this was likewise turned down.[4] McKim then told Strutz that he had learned the previous night that the inside employees received 3 weeks vacation after 10 years of service, and that he would like to have the proposed contract, which provided for 3 weeks after 15 years, changed to 10 years. According to McKim, Strutz told him that this had been company policy and that he could agree to it without referral to Seyfert. McKim then told the drivers another vote should be taken on the contract. The only change was from the 15 to 10 years service requirement which McKim stated had been agreed to by Strutz. Six

2. According to McKim members of Local 580 employed by Respondent also attended the meetings.

3. General Counsel's Exhibit No. 5. The original tentative agreement had been prepared by Strutz.

4. The contract term had been an issue throughout negotiations.

unit employees were present and voted four to two to accept the contract. When Strutz and Cawvey returned McKim said the employees had voted acceptance and suggested that the contract, with the vacation clause change, be signed. Strutz then told him that he would not sign the contract because he did not believe Local 580 represented a majority of the employees and that the National Labor Relations Board was going to hold another election to determine Local 580's majority status.[5] McKim said he would turn the matter over to his attorney and no further meetings were held.

Strutz testified that after about 6 months of negotiations tentative agreement was reached, that he prepared a contract embodying the agreement which was rejected unanimously by the employees and that the employees voted five to three to strike. On or about July 30, Strutz and Cawvey, at McKim's request, met with the drivers to explain the contract: (Strutz testified it was the same contract previously rejected). It was again rejected unanimously by the drivers. On August 27, McKim met again and six drivers were present. McKim then presented his own prepared version of the Respondent's prior proposal, assuring Strutz it was identical. When McKim suggested the vacation change Strutz told him he saw no objection but that he would seek approval from Seyfert. McKim also asked for a shorter term contract which was turned down. McKim then returned to the room and later announced that the men had approved the contract by four to two. Strutz then told him that in view of the fact that a decertification petition had been filed and that only four of the drivers had approved the contract, he would not submit it for approval.

5. On July 18, 1968, Jack H. Karr, an employee had filed a petition for decertification of Local 580 (Case No. 7-RD-773) which was dismissed by the Regional Director for Region 7 on July 29 on the ground that the one-year certification bar precluded an election. (General Counsel's Exhibit Nos. 4-a and 4-b).

Cawvey's testimony supported that of Strutz respecting the necessity of taking the vacation change back to Seyfert for approval although he admitted it was policy for the inside employees to receive 3 weeks after 10 years. He testified briefly as to some of the difficulties that would be encountered in rescheduling the drivers to provide for the change and that the change was never submitted to Seyfert for approval.

Four drivers testiifed, Brett, Dolph, Karr and Moorehead and their testimony is generally consistent with that of the other witnesses.

Karr testified that Cawvey told McKim that the vacation clause change was acceptable since it was a matter of policy with respect to the other employees and that McKim proceeded to make the change. Dolph and Moorehead, on the other hand, stated that Strutz told McKim he would take the vacation clause to Seyfert for approval.[6]

B. *Conclusions*

The sole issue providing any problem is whether complete agreement was reached between the parties on a contract, including the change in the vacation clause. The testimony of the negotiators establishes that full agreement had been reached on August 27 as to all other terms. McKim's testimony indicates that Strutz readily agreed to the vacation change on the ground that since the inside employees received 3 weeks after 10 years service there was no problem. His testimony is supported by one of the driver-salesmen who attended the meeting. Strutz testified he would have to take the change back to Seyfert and he is supported by Cawvey and two of the driver-salesmen.

6. Dolph was a witness for Respondent and while his testimony, as the record reveals, was unclear as to everything else that was said he did clearly state that Strutz told McKim he would go to Seyfert for approval of the vacation change. Moorehead was likewise a witness for Respondent.

I do not think the issue can be decided by weight of numbers nor does the demeanor of the chief witnesses provide any clue. McKim, Strutz and Cawvey not only gave every appearance of truthfulness but apparently trusted each other. (Witness Strutz's acceptance of McKim's assurance that his proposed contract did not differ from that submitted by Strutz). This compounds the difficulty in reaching decision.

I do find, however, that complete and final agreement was reached between the parties on August 27. This finding is based upon the following extrinsic facts as distinguished from the testimony:

1. The change in the vacation clause requested by McKim was a minor one and conformed to the current policy of the Respondent with respect to inside employees. I see no reason why such a change would have to be referred to Seyfert and I accept McKim's testimony that Strutz said the change imposed no difficulty.

2. Strutz never stated that the vacation clause was the reason for rejecting the agreement. Strutz stated that Respondent doubted Local 580's continuing majority status and was therefore rejecting the contract.

3. The conduct of McKim at the meeting of August 27 indicated that he would accept the contract proposed by the Respondent if he could have it ratified by the membership. All changes which were proposed by McKim and refused by Respondent were discarded by McKim and it is evident that he was willing to accept the agreement proposed by Respondent.

I therefore find that by refusing to sign the contract agreed upon by the parties, including the change in the vacation clause from 15 to 10 years of service for eligibility for a 3-week vacation, Respondent violated Section 8(a)(5) of the Act.

I cannot accept Respondent's contention that Local 580 lost its majority status during the certification year and that Respondent was thereby relieved of its bargaining obligation. It is clear as any proposition in labor law can be that an employer is not relieved of his obligation during the certification year absent unusual circumstances.[7] The mere filing of a decertification petition during the exempted period does not serve to justify a good faith doubt on the part of the employer.[8] The allegation that the meeting of six employees was a "rump" meeting and that the vote of four to two in favor of the contract indicates a loss of majority are no more than self-serving allegations.

I therefore find that by refusing on August 27 to recognize and bargain with Local 580 as the exclusive bargaining representative of its employees in the unit found appropriate herein Respondent violated Section 8(a)(5) and (1) of the Act.

III. The Remedy

Having found the Respondent has engaged in and is engaging in certain unfair labor practices it shall be recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

Having found that Respondent and Local 580 reached agreement on all substantive provisions of a contract (General Counsel's Exhibit No. 5) on August 27, 1968, and that said contract was ratified by the member employees of Local 580 on that date it shall be recommended that Re-

7. *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96; *Celanese Corporation of America*, 95 NLRB 664.

8. *Ridge Citrus Concentrate, Inc.*, 133 NLRB 1178.

spondent be ordered to execute, sign and give effect to all the terms and conditions of said contract.[9]

It shall be further recommended that Respondent make the employees in the unit found appropriate herein whole for any loss of benefits they may have suffered from August 27, 1968, by reason of Respondent's failure to give effect to said contract to the date of compliance with this Recommended Order.[9a]

Upon the foregoing findings and conclusions, and upon the entire record in this case, I make the following:

Conclusions of Law

I. By refusing to execute, sign and give effect to the contract agreed by the parties on August 27, 1968, and by refusing, on that date to recognize Local 580 as the exclusive bargaining agent of its employees in a unit appropriate for the purposes of collective bargaining, Respondent violated Section 8(a)(5) and (1) of the Act.

II. The unit appropriate for the purposes of collective bargaining is:

> All driver-salesmen employed by the Employer at its Lansing, Michigan, place of business, excluding production employees, office and plant clerical employess, professional and technical employees, guards and supervisors as defined in the Act.

III. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

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9. In view of this it is to be understood that the usual bargaining order recommended herein will be prospective only and will not require bargaining with respect to the contract I find has been agreed upon.

9a. *N.L.R.B. v. Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.*, ... U.S. ..... (January 15, 1969).

RECOMMENDED ORDER

It is hereby recommended that the Respondent, Adams Potato Chips, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to execute, sign and give effect to the contract agreed upon by the parties of August 27, 1968.

(b) Refusing to recognize and bargain in good faith with Local 580 as the exclusive collective-bargaining agent of its employees in the unit found appropriate herein.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, recognize and bargain collectively and in good faith with Local 580 as the exclusive collective-bargaining agent of its employees in the unit found appropriate herein.

(b) Execute, sign and maintain in effect all the terms and conditions of the contract agreed upon by the parties on August 27, 1968.

(c) Make whole its employees in the unit found appropriate herein for any loss of benefits they may have suffered from August 27, 1968, by reason of its failure to give effect to the terms and conditions of said contract.

(d) Post at its place of business at Lansing, Michigan, copies of the notice attached hereto and marked "Appendix."[10] Copies of said Notice, on forms to be provided

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10. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the word "a Decision and Order."

by the Regional Director for Region 7, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Decision, what steps it has taken to comply herewith.[11]

Dated at Washington, D.C., February 26, 1969.

/s/ John F. Funke
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD and in order to effectuate the policies of the NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse to bargain, upon request, with TEAMSTERS AND CHAUFFEURS UNION No. 580, as the exclusive bargaining agent of our employees in the unit described as follows:

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11. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 7, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

All driver-salesmen employed by us at our Lansing, Michigan, place of business, excluding all production employees, office and plant clerical employees, professional and technical employees, guards and supervisors as defined in the Act.

WE WILL sign and maintain in effect all the terms and conditions of a contract agreed upon between Local Union No. 580 and us on August 27, 1968, and said contract, as agreed upon, shall provide for 3 weeks vacation after 10 years of service.

WE WILL give effect to all the terms of said contract from August 27, 1968, and reimburse our employees for any loss of benefits they may have suffered because we failed to give effect to such contract on August 27, 1968.

Adams Potato Chips, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226 (Tel. No. 313-226-3244).

DECISION AND ORDER

On February 26, 1969, Trial Examiner John F. Funke issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief. The General Counsel filed a brief in answer to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Adams

1. On page 3, line 41, of his Decision, the Trial Examiner inadvertently referred to Karr rather than Brett (correct spelling Bretz) as testifying in support of McKim's version of the events occurring at the August 27 meeting. We hereby correct this error.

2. The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions and briefs adequately present the issues and the positions of the parties.

Potato Chips, Inc., Lansing, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. May 22, 1969.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1970

ADAMS POTATO CHIPS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 30, 1970.

Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 4th day of November, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1180

ADAMS POTATO CHIPS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3–A13) is reported at 430 F. 2d 90. The Board's decision and order (Pet. App. A13–A25) are reported at 176 NLRB No. 16.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1970. On November 4, 1970, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including December 30, 1970 (Pet. App. A25), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

414-975—71

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company and Union had reached a full and final bargaining contract which the Company then refused to execute.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. App. A1–A2.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 20, 1967, after having won a Board-conducted election, the Union[1] was certified by the Board as the bargaining representative of the Company's eight driver-salesmen (Pet. App. A14; R. 122–123).[2] Bargaining commenced in November 1967. The Union was represented by Secretary-Treasurer Lloyd McKim, and several of the driver-salesmen were also in attendance; the Company was represented throughout the negotiations by its attorney, Donald F. Strutz, and by sales and advertising Department Manager Eugene Cawvey. (Pet. App. A15; R. 62–63, 74, 113.) At the outset of the bargaining, Union Representative McKim stated that any agreement reached during negotiations would be tentative, subject to approval of the bargaining unit employees. Company negotiator

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[1] Local 580, International Brotherhood, of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2] "R." references are to the joint appendix to the briefs in the court below.

Strutz similarly announced that agreements reached at the bargaining table would be subject to the approval of Company President Charles Seyfert. (Pet. App. A15; R. 24, 63, 76, 93–94.)

1. THE NEGOTIATIONS PRIOR TO AUGUST 27, 1968

The parties met on more than ten occasions over the next six months, and finally worked out the terms of a tentative agreement. President Seyfert approved the agreement, but the driver-salesmen voted unanimously to reject it. (Pet. App. A15; R. 25–26, 71, 114.) Thereafter, the parties met on several occasions but the Company refused to agree to any changes in its prior proposals (Pet. App. A16; R. 72, 114).[3] On July 30, 1968, Company negotiators Strutz and Cawvey met with the employees, at McKim's request, in an effort to explain the route-cutting provisions of the proposed contract. That evening, the employees again voted unanimously to reject the contract. (Pet. App. A16; R. 72, 114–115.)

2. THE AUGUST 27 MEETING

On August 27, the parties met again to continue negotiations. McKim was accompanied by six of the eight driver-salesmen. (Pet. App. A16; R. 104, 105, 114–115.) He opened the meeting by presenting Strutz with written contract proposals identical to those previously offered by the Company, and asked if this contract offer, approved by Seyfert, was "still in effect."

[3] The Union asked the Company to reconsider its proposals respecting overages and shortages, and the cutting of driver-salesmen's routes (Pet. App. A16; R. 72, 114).

Strutz assured him that it was. (Pet. App. A16; R. 66–67, 105, 115.) McKim again asked for changes with respect to overages and shortages, and proposed that the duration of the contract be reduced from three to two years. Strutz rejected both proposals. (Pet. App. A15; R. 67–68, 116.) McKim then asked if the Company would grant the driver-salesmen a three-week vacation after ten years' service, instead of the current proposal of fifteen years' service, since this was what the inside employees had been receiving (Pet. App. A15, A17–A18; R. 67, 84–85, 115).[4] Strutz replied, "We wondered why you didn't ask" for this before and "I think we can give you that without any question, because it is company policy and all of the rest of the employees get it" (Pet. App. A15, A17–A18; R. 60, 67, 115–116; see also R. 84–85, 101). McKim asked Strutz if he would "have to check that with Mr. Seyfert," and Strutz replied, "no this is company policy and we can get along with that" (Pet. App. A15, A17–A18; R. 67, 84–85).

Shortly thereafter, McKim asked Strutz and Cawvey to leave the room, and the employees voted, 4–2, to accept the Company's proposed contract with the three-weeks-after-ten-years provision(Pet. App. A15, A18; R. 69). When Cawvey and Strutz returned, McKim stated, "You have got a contract," and requested that the agreement including the vacation clause be executed as soon as possible (Pet. App. A16; R. 70, 116). Strutz refused, asserting for the first

[4] On the night before the August 27 meeting, McKim learned that the in-plant employees were receiving a three-week vacation after ten years' service (Pet. App. A15; R. 67).

time that the Union had lost its majority status, and that a petition for a decertification election had been filed (Pet. App. A16, A18–A19; R. 70, 87, 116).[5] The meeting thereupon ended (R. 116).

B. THE DECISIONS BELOW

The Board, adopting the Trial Examiner's findings, found that, on August 27, 1968, the parties had reached agreement on a complete contract, including the change in the vacation clause, and that the Company then refused to execute and give effect to that contract (Pet. App. A18, A24).[6] The Board concluded that, by thus refusing to sign the contract and by thereafter refusing to recognize the Union as the certified bargaining representative of its employees,

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[5] On July 18, 1968, the Company filed a petition with the Board's Regional Director seeking to decertify the Union as the bargaining representative. The Director dismissed the petition on July 29, relying upon the settled rule that, during the first year of a union's certification, its majority status is irrebuttably presumed and cannot be attacked in a decertification proceeding (Pet. App. A16; R. 128–129). At the time of the August 27 meeting, the Union's "certification year" still had almost a month to run.

[6] The Trial Examiner credited McKim's testimony (R. 67, 70), which was corroborated by employee Bretz (R. 85, 87), that Strutz said the vacation change was acceptable without obtaining Seyfert's approval (Pet. App. A17–A18). In accepting McKim's version rather than the contrary testimony of Strutz and others (R. 100, 106–107, 116), the Examiner relied, *inter alia*, on (1) the uncontradicted evidence that the vacation change conformed to existing policy with respect to inside employees; and (2) the fact that Strutz never stated that the vacation clause was the reason for rejecting the agreement, which had otherwise been previously approved by President Seyfert (Pet. App. 18).

the Company violated Section 8(a)(5) and (1) of the Act (Pet. App. A18–A20). The Board ordered the Company to cease and desist from the unfair labor practices found; to recognize and bargain with the Union upon request; to "execute, sign, and maintain in effect all the terms and conditions of the contract agreed upon by the parties on August 27, 1969"; to make the employees whole for any loss of benefits suffered by reason of the Company's nonobservance of the contract; and to post the usual compliance notice (Pet. App. A21–A23).

The court of appeals, Judge Weick dissenting in part, sustained the Board's findings and conclusions, and enforced its order (Pet. App. A3–A13). The court held that the Board's finding that the Company had agreed to the vacation change proffered by the Union "is supported by testimony that appears in the record"; "[w]e cannot say that it is insubstantial when viewed on the record as a whole" (Pet. App. A9).[1]

ARGUMENT

Petitioner's basic contention is that the order of the court below conflicts with *H. K. Porter* v. *National*

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[1] While agreeing that the Company had bargained in bad faith, Judge Weick would not have required the Company to execute the contract since, in his view, there was insufficient evidence to show that Stratz had authority to complete the contract of August 27 without obtaining Seyfert's ratification (Pet. App. A11–A13). Judge McAllister, a member of the panel majority, responded, in a concurring opinion, that, even assuming that Stratz's authority was limited, Seyfert ratified the change agreed to by him by failing to repudiate it "either subsequent to the negotiations or as soon thereafter as he had heard of it, or at any time during this protracted proceedings * * *" (Pet. App. A9–A10).

Labor Relations Board, 337 U.S. 99, because it requires the Company to accept a substantive contract provision which was not agreed to in collective bargaining. That issue is not presented here. The Board found that the Company refused to execute a contract whose terms had in fact been agreed to by both parties. See *H. J. Heinz* v. *National Labor Relations Board*, 311 U.S. 514. Accordingly, the only issue presented is whether the court of appeals properly concluded that there was substantial evidence to support the Board's finding. Such an evidentiary issue does not warrant further review by this Court. In any event, the record adequately supports the Board's finding (see notes 6 and 7, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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